

STATE OF MICHIGAN
COURT OF APPEALS

In re NORMA C. ZARSKE REVOCABLE
LIVING TRUST.

DUANE ZARSKE, Trustee of the NORMA C.
ZARSKE REVOCABLE LIVING TRUST,

UNPUBLISHED
September 18, 2018

Appellant,

v

DIANE REYNOLDS and JOANN ZARSKE,

No. 340361
Alpena Probate Court
LC No. 15-016022-TV

Appellees.

Before: MURRAY, C.J., and CAMERON and LETICA, JJ.

PER CURIAM.

Appellant Duane Zarske, as trustee of the Norma C. Zarske Revocable Living Trust, appeals as of right the May 2, 2017 opinion and order requiring that the value of certain farmland be considered when determining the Trust beneficiaries' shares at the time of distribution, as well as the September 8, 2017 supplemental opinion and order denying his motion for reconsideration. For the reasons stated herein, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On November 25, 1997, Norma C. Zarske established the Norma C. Zarske Revocable Living Trust. The Trust Agreement lists Norma as the initial trustee, appellant as the first successor trustee, and Norma's children – appellant, Daniel Zarske,¹ Diane Reynolds, and JoAnn Zarske,² as the beneficiaries.

¹ Daniel acted *in propria persona* below and is not a party to this appeal.

² The Trust does not actually name JoAnn and Diane as beneficiaries, but refers to Norma's "sons" and "daughters." There is no dispute that appellant and Daniel are her sons, and JoAnn and Diane are her daughters. We will refer to JoAnn and Diane collectively as appellees throughout this opinion.

According to the Trust's "General Assignment and Declaration," Norma transferred, conveyed, and assigned to the Trust "all of [her] right, title and interest in and to all of [her] personal property, however owned, whether tangible or intangible, now owned or later acquired." That property is to be distributed in accordance with the Trust Agreement, which differentiates between Norma's farm assets and non-farm assets,³ and provides in Article 6:

On my death, the remaining assets of the Trust will be divided into two separate categories, "farm assets" and "non-farm assets."

* * *

Any Farm Assets which the Trust owns (if any) shall be distributed, in equal shares, to my sons, DANIEL ZARSKE and DUANE ZARSKE. The Non-Farm Assets shall be distributed to my daughters in approximately equal shares, but only in amounts sufficient to assure that each daughter receives a share equal to the shares received by my sons. All remaining property shall be shared approximately equally, by all of my children.

However, it is my desire that each of my daughters receive an amount equal to at least \$100,000. To that end, if I have retained any mineral rights on land previously conveyed, including any ongoing oil and gas leases, the income from such leases and any other mineral rights, shall be paid to my daughters until the total amount of such payments, together with the net amounts they receive from this trust, shall be equal to \$100,000 for each of my daughters. Thereafter, the income from any ongoing leases is to be shared equally by all my children, and the Trustee shall convey the mineral rights to the property owners.

Further, attached to the Trust Agreement is a legal description of farmland located in Wilson Township, and an amendment to the Trust Agreement labeled Exhibit B.

On the same day Norma established the Trust – November 25, 1997 – she both leased and deeded to appellant and Daniel the exact farmland described above.⁴ The "Farm Real Estate Lease" lists Norma, trustee of the Trust, as landlord of the property, and appellant and Daniel as

³ The Trust Agreement defines "farm assets" as "all farmland, buildings, grain and feed storage facilities, silos, outbuildings, tool sheds, barns, machinery and equipment, tools and crops, whether in the field or in storage, and all other items reasonably necessary to the continuation of the farming operation, including such cash or other accounts which are directly related to such farming operations." "Non-farm assets" are defined as "all other assets, including my life insurance proceeds, bank accounts, brokerage accounts, retirement plan assets, and any other financial assets of any kind or character whatsoever which do not qualify as 'farm assets' under the definition above."

⁴ The legal description attached to the Trust Agreement is identical to that attached to the lease, both labeled "Legal Descriptions to Farm Real Estate Lease," and the legal description attached to the quitclaim deed describes the very same property.

joint tenants. Further, the lease requires appellant and Daniel to pay monthly rent for the property, and states, “All payments of rent or the other sums to be made to the LANDLORD shall be made at such places the LANDLORD shall designate in writing from time to time.” In contrast, the deed makes no mention of the Trust, stating instead that Norma, as survivor of herself and Arnie Zarske, quitclaimed and conveyed the farmland to appellant and Daniel “[e]xcluding all mineral rights,” but retained a life estate in the property which included the right of possession and rents. According to a timestamp on the top right corner of the deed, it was not recorded until April 13, 1998.

Norma subsequently passed away on July 19, 2014. Almost a year later on July 9, 2015, appellees filed an initial petition for construction, supervision, and addition of assets to the Trust, alleging that appellant, acting as successor trustee of the Trust, excluded the above farmland from the Trust inventory, which drastically reduced the shares they would receive upon distribution. In so doing, they admitted that Norma had conveyed the farmland to appellant and Daniel outside of the Trust, but asserted that the Trust is ambiguous and pursuant to Article 6, Norma may still have intended for the value of the farmland to be considered when determining the children’s shares.

Appellant responded to the petition, asking that the Court deny the relief requested, and filed a motion in limine to exclude evidence on April 11, 2016, arguing against the admissibility of parol evidence to aid in the interpretation of the Trust because “[t]he Trust instrument is clearly unambiguous and recognizes the possibility that the Trust may not own any ‘farm assets’ as the instrument provides that ‘[a]ny Farm Assets that the Trust owns (if any).’ ” In a response filed December 9, 2016, appellees asserted: “The Trust and deed as estate planning documents are wholly inconsistent because the removal of \$700,000 from the trust gives the boys an enormous windfall and is totally incongruent with the trust addendum which includes the real estate in the trust because it treats each child equally. The language of the trust was written to include the farm property in the dispositive intentions of the Settlor. Parole [sic] is needed to explain why the real estate should have been in the trust.” Following a hearing, the trial court granted appellant’s motion to exclude evidence, finding that no ambiguity existed in the Trust, and that the farmland could not be considered a Trust asset at the time of distribution because the property had been deeded to appellant and Daniel.

Thereafter, appellees filed an amended petition, adding claims of undue influence against appellant and Daniel. During the bench trial conducted on April 27, 2017, the court admitted into evidence, without objection, the Trust Agreement, the farmland lease, and the quitclaim deed. At the close of appellees’ case, following the testimony of both Diane and JoAnn, appellant’s counsel moved for a directed verdict, arguing that appellees failed to present any evidence of undue influence to overcome the court’s previous rulings that the Trust is unambiguous and that the farmland could not be considered a Trust asset.

Ultimately, the trial court denied the motion for a directed verdict, despite finding no evidence of undue influence. In so doing, it examined the estate planning documents and the parties’ conduct in relation to those documents to determine Norma’s intent in establishing the Trust, finding that both the lease and the legal description of farmland attached to the Trust Agreement are defective because the Trust never owned the property, as evidenced by the quitclaim deed and its recording in April 1998, and thus, the farmland could not be considered a

Trust asset for the purpose of distribution. Nevertheless, the court ordered that the value of the farmland be considered in the distribution of Trust assets, reasoning:

[I]n the estate plan and specifically the language of distribution in the Trust it is properly considered, or its value, specifically Article #6, **FARM ASSETS**. “*Farm Assets shall consist of all farmland . . .*” Because all the documents were dated 11/25/1997, its value was properly considered part of the distribution even though it was not technically part of the inventory of the Trust. Again, the Trustor/Creator of the Trust, Norma C. Zarske, by attaching the legal descriptions of the farmland to the Trust and including it as part of the inventory, considered it even though it was not technically conveyed to the Trust. Further evidence of this are the dates of the Trust, Deed, and Lease, again, all dated 11/25/97.

On May 23, 2017, appellant filed a motion for rehearing or reconsideration pursuant to MCR 2.119(F), arguing that the probate court committed a palpable error when it reasoned that the legal description of farmland attached to the Trust Agreement constituted the Trust’s schedule A list of inventory. But following a motion hearing during which the court said it would take appellant’s argument under advisement, and a separate status conference, the court denied the motion for reconsideration.

II. ANALYSIS

Although he provides several different arguments in support of his appeal, appellant contends generally that the trial court erred when it ruled that the value of the farmland be considered at distribution to determine the children’s respective shares of the Trust. “An appeal of a decision of the probate court . . . is on the record; it is not reviewed de novo.” *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). We instead review a probate court’s factual findings for clear error and its dispositional rulings for abuse of discretion. *Id.* However, “[t]he interpretation of a trust agreement is . . . a question of law reviewed de novo on appeal.” *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 693; 880 NW2d 269 (2015).

“In resolving a dispute concerning the meaning of a trust, a court’s sole objective is to ascertain and give effect to the intent of the settlor.” *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). “The settlor’s intent is ascertained by looking to the words of the trust itself.” *Brown Trust*, 312 Mich App at 693. “If ambiguity exists, the court must look outside the document in order to carry out the settlor’s intent, and may consider the circumstances surrounding the creation of the document and the general rules of construction.” *In re Kostin*, 278 Mich App at 53. Further, “[a] court must . . . read a trust as a whole, harmonizing its terms with the intent expressed, if possible.” *Brown Trust*, 312 Mich App at 694.

In its opinion and order following the bench trial, the probate court explained that it examined the language of the Trust, the estate planning documents, and the parties’ conduct in relation to those documents, to find that although the farmland is not Trust inventory for the purpose of distribution, Norma intended that the value of the farmland be considered at distribution. In support of these findings, the court cited the language in Article 6 of the Trust Agreement, the fact that the Trust, quitclaim deed, and lease were all dated November 25, 1997, and Norma’s decision to attach to the Trust Agreement the legal description of the farmland.

Appellant first challenges the court's ruling by asserting that the farmland was never a Trust asset, and "[f]or property to be distributed pursuant to a Trust, it must be placed in the Trust." However, as noted above, in concluding that Norma intended the value of the farmland to be considered when calculating the shares of assets owed to the beneficiaries at distribution, the court explicitly found that the property is not and has never been a Trust asset. In other words, the court recognized the brothers' ownership of the property, and never ordered that the farmland itself be distributed to appellees.⁵ Thus, appellant's argument fails.

Moreover, appellant's brief is wholly deficient, as he fails to include detailed record or legal citations in support of his arguments in violation of MCR 7.212(C)(6) and (7). " 'An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his claims.' " *Brown Trust*, 312 Mich App at 695 (citation omitted). " 'And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.' " *Id.* (citation omitted).

Appellant next asserts that the probate court erred when it ruled that Norma intended for the value of the farmland to be considered at distribution, and denied his motion for a directed verdict, because

in this case, the burden of proof was to show that the Trust was ambiguous. In light of the Court's previous ruling in its Order filed on December 14, 2016 that found that there was no ambiguity in the Trust and that the Trust assets as of the date of death do not include the property conveyed in the Deed dated November 25, 1997 and recorded in April 1998, it was error for the Court to not grant the directed verdict/involuntary dismissal based on the evidence presented. As the Court did not allow parol evidence and as the Court specifically ruled during the pervious [sic] hearing that parol evidence was not admissible, it is the position of [appellant] that [appellees] in this matter did not meet their burden of proof and therefore no further inquiry was needed.

This argument also fails.⁶ Appellant cites no authority whatsoever for his assertion that the probate court, after ruling on the motion in limine to exclude parol evidence, could not later revisit or alter its decision. Again, " '[a]n appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims.' " *Brown Trust*, 312 Mich App at 695 (citation omitted). " 'And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.' " *Id.* (citation omitted).

⁵ In its opinion and order following the bench trial, the probate court stated: "When the Deed was recorded, it was clear that it was not part of the Trust property. Thus, on the ultimate distribution upon the death of Norma C. Zarske, the property itself is legally titled to Duane Zarske and Daniel Zarske and is not part of the inventory of the estate."

⁶ "[D]ecisions on a motion for directed verdict are reviewed de novo" *Chelik v Capitol Transp, LLC*, 313 Mich App 83, 88; 880 NW2d 350 (2015). "When deciding a motion for directed verdict, the evidence and legitimate inferences are reviewed in the light most favorable to the nonmoving party." *Id.* at 88-89.

Regardless, the court's decision on appellant's motion in limine, at least with regard to the status of the farmland, was not inconsistent with its denial of the motion for directed verdict and opinion and order following the bench trial, as appellant implies. In both, the court found that the farmland was not an asset of the Trust, as it was never actually conveyed to the Trust, and the court's ruling that Norma intended the value of the farmland to be considered when calculating the beneficiaries' shares of Trust assets did not alter this finding. Thus, on the basis of this argument, we cannot hold that the court erred with regard to its ultimate ruling.⁷

Nor do we agree with appellant's argument that because the court denied his motion for a directed verdict, it should have granted rehearing and allowed him to present the affidavit of Andrew Richards, the attorney who drafted the Trust Agreement, which he says describes Norma's actual intentions for the distribution of the Trust's assets. First, following the court's denial of appellant's directed verdict motion on the record, appellant's attorney explicitly refused the opportunity to present any proofs to the court. Second, the court had presumably already considered Richards's affidavit at the time it issued its opinion and order following the bench trial, as appellant had attached it to his motion in limine to exclude evidence. And finally, we fail to understand how an additional review of the affidavit would have led the probate court to change its ultimate ruling with regard to the farmland. In the affidavit, Richards states: "The real estate associated with the farm was conveyed outright to Duane Zarske and Daniel Zarske retaining a life estate interest in the property. Norma C. Zarske entered into a rental agreement with Duane Zarske and Daniel Zarske concerning the farm real estate." But as discussed extensively above, the court made this same finding while ultimately concluding "that the value of the real property described in the Quit Claim Deed . . . is to be considered in the distribution of the assets of the Trust." And the affidavit does not contradict the propriety of that conclusion, or offer any opinion regarding the value of the farmland.⁸

Finally, appellant asserts that the probate court erred when it denied his motion for reconsideration because the court committed a palpable error that should have been corrected.

⁷ We note further that despite finding the Trust to be unambiguous following the motion in limine hearing, the court considered in that hearing, and admitted into evidence at the bench trial, the farmland lease and quitclaim deed, both separate documents outside of the Trust Agreement. See *Brown Trust*, 312 Mich App at 693 ("The settlor's intent is ascertained by looking to the words of the trust itself. If the trust's terms are ambiguous, a court must look outside the document to determine the settlor's intent, and it may consider the circumstances surrounding the creation of the trust and the general rules of construction.") (citations omitted).

⁸ It states only, similar to the language in Article 6 of the Trust Agreement, that

Norma C. Zarske intended that the remaining trust assets, be first distributed in equal amount to Diane Reynolds and JoAnn Zarske, until they each received amounts equal to the value of farm assets distributed from the trust (if any) to Duane Zarske and Daniel Zarske, and then, following disposition of "farm assets" and "non-farm assets," the remaining assets be divided approximately equally amongst her four children: Duane Zarske, Daniel Zarske, Diane Reynolds, and JoAnn Zarske.

Specifically, he contends that the farmland legal description attached to the Trust Agreement ultimately admitted into evidence at the bench trial was not the Trust's Schedule A inventory list, "and, as such, the Court's finding that the attachment to the Trust contained the legal descriptions of farm real estate was a palpable error by which the Court was misled in its determination."

Generally, we review "a trial court's decision regarding denial of a motion for rehearing or reconsideration for an abuse of discretion." *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). However, appellant raised this challenge to the attachment for the first time in his motion for reconsideration, and " '[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved.' " *Demski v Petlick*, 309 Mich App 404, 441-442; 873 NW2d 596 (2015), quoting *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) (alteration in original).⁹ Thus, we review the probate court's decision for plain error. See *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). To be successful on a motion for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

In its opinion and order following the bench trial, the court referred to the legal description included with the Trust Agreement as Exhibit A, and stated:

[The farmland's] value was properly considered part of the distribution even though it was not technically part of the inventory to the Trust. Again, the Trustor/Creator of the Trust, Norma C. Zarske, by attaching the legal descriptions of the farmland to the Trust and including it as part of the inventory, considered it even though it was not technically conveyed to the Trust. Further evidence of this are the dates of the Trust, Deed, and Lease, again, all dated 11/25/97.

Raising the issue he now raises on appeal, appellant filed a motion for reconsideration or rehearing, presenting the Trust's purported Schedule A list of inventory to the court at the hearing.¹⁰ Ultimately, the probate court denied the motion with no explanation of its ruling.

On the record before us, we see no basis to conclude that the probate court plainly erred when it denied appellant's motion for reconsideration. It explicitly recognized in its opinion following the bench trial that the farmland was never conveyed to the Trust (thereby implicitly recognizing that it would not appear in the formal Schedule A list of the Trust inventory), and appellant presented no evidence that Norma did not actually attach to the original Trust Agreement the legal description of the farmland. Thus, he failed to demonstrate that the court's

⁹ Appellees attached the Trust Agreement, including the farmland legal description now challenged by appellant, to a number of their pleadings below, and the court admitted that version of the Trust Agreement into evidence at the bench trial with no objection from appellant.

¹⁰ Appellant attached this Schedule A to his brief on appeal, but it does not exist in the lower court record as he failed to attach it to his motion for reconsideration, and neither party attached it to any pleading or any copy of the Trust Agreement included with pleadings.

use of that attachment to decipher Norma's intent constituted palpable error. Moreover, the court made clear in its opinion that it considered other factors, including the language of the Trust Agreement and the dates on the varying estate documents, to reach its ultimate determination, methods of trust interpretation that appellant does not challenge on appeal.

Affirmed. Appellees may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Thomas C. Cameron

/s/ Anica Letica